

No. 20,585

FEB 26 1969

IN THE  
**United States Court of Appeals**  
**For the Ninth Circuit**

ANITA T. OWENS,

*Appellant,*

vs.

RAYMOND L. WHITE, JOHN C. McCARTER,  
ALFRED POPMA, and ST. LUKE'S HOSPITAL,  
a corporation,

*Appellees.*

Appeal from Summary Judgment of Dismissal  
of the United States District Court  
for the District of Idaho,  
Southern District

Honorable Ray McNichols, Judge

**APPELLANT'S PETITION FOR A REHEARING**

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FILED

JUL 27 1967

WM. B. LUCK, CLERK

FILED

~~MAY 27 1967~~

WM. B. LUCK, CLERK

AUG 2 1967



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*To the Honorable Chief Judge, and to the Honorable  
Associate Judges of the United States Court of  
Appeals for the Ninth Circuit:*

Appellant herein, in accordance with Rule 23 of the Rules of Court of the United States Court of Appeals for the Ninth Circuit, respectfully petitions this Honorable Court that it grant a rehearing en banc, setting aside that certain judgment and opinion

issued by the aforesaid Court on the 30th day of June, 1967.

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### **STATEMENT OF THE CASE**

This is a medical malpractice action and is before this Court on the basis of diversity of citizenship, the original jurisdiction of the District Court existing under 28 U.S.C.A. §1332. The amount in controversy exceeds the sum of ten thousand dollars (\$10,000.00), exclusive of interest and costs. This Honorable Court has jurisdiction pursuant to the provisions of 28 U.S.C.A. §1291.

The action was commenced on October 11, 1963. Motions to Dismiss, premised upon the affirmative defense of the statute of limitations, as set forth in §5-219, Idaho Code, were filed on the 26th day of November, 1963 and the 3rd day of December, 1963. On December 20, 1963, the District Court granted the Motion to Dismiss without leave to amend. Thereafter, on the 12th day of March, 1965, this Honorable Court reversed the judgment and remanded the cause for further proceedings.

On June 2, 1965, the District Court held an evidentiary hearing to determine whether the "discovery rule" should be applied to determine when appellant's cause of action accrued. Thereafter, and on the 22nd day of June, 1965, the District Court filed its memorandum decision, including Findings of Fact and Conclusions of Law, determining that the "discovery rule" ought not to be applied in this case. Findings, conclusions and a joint Order were thereafter filed



on July 19, 1965. On August 23, 1965, Appellees' Motion for Summary Judgment came on for oral argument. Summary Judgment was granted and, on the 22nd day of September, 1965, the District Court entered its Judgment of Dismissal with prejudice.

Appellant having duly filed her Notice of Appeal, Statement of Points on Appeal and Designation of Contents of Record on Appeal, briefs were thereafter submitted by Appellant and the Appellees. Oral argument was heard before Circuit Judges Hamlin, Koelsch and Ely. On June 30, 1967, Judge Hamlin dissenting, this Honorable Court filed its opinion, affirming the Judgment of Dismissal entered below.

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#### **GROUND FOR REHEARING**

Appellant respectfully petitions for a rehearing en banc on the following grounds:

(1) The District Court was clearly wrong in its determination that Idaho would not apply the "discovery rule" in this case.

(2) The District Court erred in granting Summary Judgment despite the existence of triable issues of fact.

(3) The District Court and this Honorable Court erred in mistakenly determining that the issue of statute of limitations is, under Idaho law, an issue of law for the court; on the contrary, the special defense of the statute of limitations raises issues of fact, which, in accordance with Idaho law, must be tried to the jury.

**CONCLUSION**

Wherefore, Appellant and Petitioner herein very respectfully petitions this Honorable Court that it grant a rehearing en banc in this case.

Dated, San Francisco, California,  
July 26, 1967.

MELVIN M. BELLI,  
*Attorney for Appellant  
and Petitioner.*

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**CERTIFICATE OF COUNSEL**

I hereby certify that I am of counsel for Appellant and Petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,  
July 27, 1967.

MELVIN M. BELLI,  
*Of Counsel for Appellant  
and Petitioner.*